In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 588

LANDON A. JACKSON, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 31–39) is not yet reported.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 17, 1967. A timely petition for rehearing was denied on June 9, 1967. The petition for a writ of certiorari was filed on September 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

278-487—67——1

QUESTIONS PRESENTED

1. Whether petitioners' suit for back pay was barred because they failed to exhaust available administrative remedies.

2. Whether petitioners' suit for back pay, filed over 5½ years after the last administrative action on their discharges, was barred by laches.

STATEMENT

On March 10, 1956, the six petitioners, civilian employees of the Department of the Army in Japan, were convicted, fined and sentenced to a term of imprisonment by general court-martial for violating Army regulations concerning the purchase and disposition of alcoholic beverages and the use of military payment certificates. Their petitions for a grant of review were denied by the Court of Military Appeals on September 11 and November 21, 1956. Accordingly, each petitioner paid his fine and served his sentence, the last being released from confinement in August 1957.

On March 30, and April 5, 1956, petitioners were notified of their proposed removals on grounds essentially the same as the charges against them in the court-martial proceedings. Each petitioner was advised of his right to respond to these charges, and four of them did so. Petitioners were advised of their removals effective May 31 and June 7, 1956. Each was also advised of his right, as a veterans' preference eligible, to process an appeal to the Civil Service Commission within 10 calendar days and all appealed to the Commission.

In letters of September 18 and September 28, 1956, the Commission advised those petitioners whose appeals it had adjudicated that their removals were affirmed.[1] These letters also advised that no further appeal would be considered unless submitted to the Commission's Board of Appeals and Review within seven days. None of the petitioners filed a further appeal.

Between September 28, 1956, the date of the last administrative action on their removals, and May 29, 1962, when they instituted the present suit, petitioners took two actions: (1) On April 12, 1957, they filed a petition with the Judge Advocate General for a retrial on their court-martial convictions; this was denied on November 17, 1960. (2) On January 14, 1960, they filed suit in a federal district court seeking declaratory relief voiding their convictions, return of the fines that had been imposed, and restoration to their positions. On November 21, 1960, the district court entered summary judgment declaring petitioners' court-martial convictions invalid but denying, as beyond the court's jurisdiction, the other relief sought. Petitioners did not appeal the denial of relief for want of jurisdiction, but the United States appealed the judgment invalidating the court-martial convictions, which was affirmed on June 16, 1961.

[1] The appeals of two petitioners were untimely, and the Commission requested further information of them concerning the reasons for their untimely filing, stating that otherwise the appeals would not be accepted. Since one late-filing petitioner did not respond to this request, he was informed on August 23, 1956 that his case was closed for failure to prosecute. The other responded with an explanation, and the Commission adjudicated his appeal.

On March 17, 1967, the Court of Claims entered its decision on cross-motions for summary judgment in the present action. The court concluded that petitioners' claims were barred by failure to exhaust their administrative remedies and by laches.

ARGUMENT

1. The decision below is correct. It has been held repeatedly that an employee who does not complete appeal of his removal by proceedings within the Civil Service Commission may not later challenge the basis of that removal. See *e.g., Hatton* v. *United States,* 173 Ct. Cl. 1187, certiorari denied, 384 U.S. 965; *Blackmar* v. *United States,* 354 F. 2d 340 (Ct. Cl.). In barring a claim against the United States, this Court has reasoned that requiring a claimant to exhaust administrative remedies permits the government to correct errors on the administrative level, and thus to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Holpuch Co.,* 328 U.S. 234, 239. This Court's reasoning applies to the present case since petitioners failed to present their argument that their removals were procedurally defective (Pet. 19–20), to the Civil Service Commission's Board of Appeals and Review when they had the opportunity to do so more than nine years ago.[2]

[2] *Mallow* v. *United States*, 161 Ct. Cl. 207, relied upon by petitioners, is not in point. There, the court held that plaintiff was not barred by failure to exhaust his administrative remedies, because the government had made it appear that no further administrative remedy was open to him. Here, the government informed the petitioners, in clear terms, of their further available remedies.

2. The Court of Claims was also correct in holding that petitioners' suit, filed over 5½ years after the last administrative action on their discharges, was barred by laches. In *Arant* v. *Lane,* 249 U.S. 367, this Court set forth the persuasive reasons for requiring public employees to exercise diligence in presenting claims for unlawful discharge:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. [*Id.* at 372.]

Much shorter intervals than the 5½ years' period in this case have been held to bar a delayed suit. *Chappelle* v. *Sharp,* 301 F. 2d 506 (C.A. D.C.), certiorari denied, 370 U.S. 903 (34½ months' delay); *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841 (33 months' delay); *Bovard* v. *United States,* 160 Ct. Cl. 619, certiorari denied, 374 U.S. 830 (4½ years' delay).

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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